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# *NML Capital v. Argentina*: Enforcing Contracts in the Shadow of the Foreign Sovereign Immunities Act

Matthew D. McGill

Alexander N. Harris

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## ARTICLE

*NML Capital v. Argentina:*  
Enforcing Contracts in the Shadow  
of the Foreign Sovereign Immunities Act

MATTHEW D. MCGILL AND ALEXANDER N. HARRIS<sup>†</sup>

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## I. INTRODUCTION

Argentina's 2001 decision to stop paying on tens of billions of dollars of debt held by private and public creditors set off the largest sovereign default in history to that point.<sup>1</sup> In the thirteen years since Argentina stopped paying on its private debt, creditors have made numerous attempts to recover what they are owed. Yet, in spite of an economic recovery that could have enabled Argentina to satisfy its obligations and thereby return to the international financial markets, Argentina instead steadfastly has refused to pay holdout creditors and resisted those creditors' legal efforts to collect what Argentina owes them. Although Argentina granted a broad waiver of sovereign immunity in the defaulted bonds in dispute, it routinely has invoked the Foreign Sovereign Immunities Act<sup>2</sup> in opposition to those efforts.

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<sup>†</sup> Matthew D. McGill is a partner in the Washington, D.C., office of Gibson, Dunn & Crutcher LLP. He graduated from Dartmouth College in 1996, and from Stanford Law School in 2000. Alexander N. Harris is an associate in the San Francisco office of Gibson Dunn & Crutcher LLP. He graduated from Harvard College in 2008 and from Stanford Law School in 2011. Together, they represent NML Capital, Ltd., one of the plaintiff creditors in the cases discussed here.

1. See Shane Roming, *Argentina's Long History of Economic Booms and Busts*, WALL ST. J. MONEYBEAT (Jul. 30, 2014, 7:43 PM), <http://blogs.wsj.com/moneybeat/2014/07/30/argentinas-long-history-of-economic-booms-and-busts>.

2. 28 U.S.C. §§ 1602, *et seq.* (2012).

On June 16, 2014, the Supreme Court rejected two such attempts. In a merits decision, *Republic of Argentina v. NML Capital, Ltd.* (the “Discovery Case”),<sup>3</sup> the Court held that the FSIA imposes only the limits set forth in the statute; because the statute does not speak to discovery about assets potentially available to satisfy a judgment against the sovereign, it does not limit such discovery efforts. On the same day, the Court declined to review a closely watched injunction that specifically enforced a promise Argentina had made in its defaulted bonds to accord its “payment obligations” under those bonds equal treatment with its payment obligations under other bonds (the “Equal Treatment Case”).<sup>4</sup> Although the Supreme Court did not explain its reasons for denying certiorari, as is customary, the reasoning of the Court’s decision in the Discovery Case left the Court with little to review in the Equal Treatment Case. As the Court explained in the Discovery Case, the FSIA limits the authority of federal courts only to the extent set forth explicitly in the statute, and because the FSIA does not impose any limits on *in personam* injunctions, but rather provides that a properly sued “foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances,”<sup>5</sup> the Act cannot be read to prohibit the specific performance order its creditors obtained.

This is precisely as Congress intended. The FSIA replaced the prior practice of sovereign immunity—which either provided “absolute” immunity for foreign governments or permitted the executive branch to make case-by-case determinations—with a codified, judicially administered and enforced list of specific immunities.<sup>6</sup> By making immunity determinations more predictable, the FSIA allows the United States to serve as a financial market to the world, where investors can make contracts knowing that they will be honored under law. The ability to sign agreements that will be enforced benefits sovereigns, especially those whose volatile histories make creditors wary of lending money secured only by the sovereign’s promise. Not all sovereigns will sign contracts as protective of creditors’ rights as those Argentina issued, but those that do so can expect to have their commitments enforced, thanks to

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3. *Republic of Argentina v. NML Capital, Ltd. (Discovery Case)*, 134 S. Ct. 2250 (2014).

4. *Republic of Argentina v. NML Capital, Ltd. (Equal Treatment Case III)*, 134 S. Ct. 2819 (2014), *denying cert. to* 727 F.3d 230 (2d Cir. 2013).

5. 28 U.S.C. § 1606 (2012).

6. *See Discovery Case*, 134 S. Ct. at 2255–56 (recounting the prior immunity determination practice and its displacement with the FSIA).

the Supreme Court's recent rulings.

## II. ARGENTINA'S DEFAULT AND SUBSEQUENT LITIGATION

Argentina has a long “history of defaulting on, or requiring restructuring of, its sovereign obligations.”<sup>7</sup> In 1994, Argentina attempted to persuade investors wary of its tumultuous past to purchase new bonds. Argentina wrote into the Fiscal Agency Agreement governing these bonds<sup>8</sup> several protections: Argentina waived sovereign immunity;<sup>9</sup> provided that the contract would be governed by New York law;<sup>10</sup> consented to jurisdiction in the federal or state courts in New York City;<sup>11</sup> and, in a clause now known as the Equal Treatment Provision,<sup>12</sup> promised that it would “rank” the “payment obligations” under those bonds “at least equally with all its other present and future unsecured and unsubordinated External Indebtedness.”<sup>13</sup> “External Indebtedness,” in turn, was defined as debt offered in whole or in part outside of Argentina in non-Argentine currency.<sup>14</sup> On the strength of these promises, investors bought billions of dollars of Argentina's bonds.

Just seven years later, Argentina defaulted.<sup>15</sup> It declared a “moratorium” on paying its debts, which it has renewed since then.<sup>16</sup> When Argentina's economy recovered, rather than lift the moratorium, in 2005, it made a unilateral offer to exchange defaulted bonds for new bonds with materially different terms that were worth roughly 25 cents on the dollar.<sup>17</sup> To coerce investors to accept this offer, Argentina promised that, apart from this bond swap, its defaulted debts never would be repaid. This threat took several

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7. *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007).

8. Fiscal Agency Agreement Between The Republic of Argentina and Bankers Trust Company, Fiscal Agent, available at <http://www.shearman.com/~media/Files/Services/Argentine-Sovereign-Debt/2013/FiscalAgencyAgreementOct191994.pdf>.

9. *Id.* at A-17.

10. *Id.* at 30.

11. *Id.* at 29.

12. The Equal Treatment Provision in Argentina's Fiscal Agency Agreement has also been called a “*Pari Passu* Clause,” but its terms offer substantially different—and greater—protections than many other “*pari passu* clauses.” See *NML Capital, Ltd. v. Republic of Argentina (Equal Treatment Case I)*, 699 F.3d 246, 251, 258–59 (2d Cir. 2012).

13. Fiscal Agency Agreement, *supra* note 8, at 2.

14. *Id.* at 16.

15. *Equal Treatment Case I*, 699 F.3d at 251.

16. *Id.*

17. *Id.* at 252.

forms: Argentina told investors that “it has no intention of resuming payment” on defaulted bonds; it informed the SEC that “it has classified unexchanged FAA Bonds as a category separate from its regular debt;” and it passed a law, known as the Lock Law, preventing the Argentine executive from making payments on the defaulted debt, or otherwise settling the debt.<sup>18</sup> Argentina briefly suspended this Lock Law in 2010 to permit a second swap of the defaulted debt, this one on terms even less favorable than those offered in 2005, before it once again forbade itself from repaying the creditors holding its defaulted bonds.<sup>19</sup> Since 2005, Argentina has been timely paying on all of the bonds issued in these exchanges—at least it had been until the injunction, discussed below, took effect—without paying a penny on the defaulted bonds.<sup>20</sup>

To attempt to recover on their defaulted bonds, plaintiffs (including our client, NML Capital, Ltd.), pursued several strategies. Plaintiffs have scoured the globe in search of assets of Argentina that could be seized to satisfy their money judgments issued by the district courts. In furtherance of this strategy, NML served subpoenas on certain banks seeking information concerning property belonging to Argentina, or to its agencies or instrumentalities, and their financial transactions.<sup>21</sup> The district court enforced the subpoenas, and Argentina—not the banks subject to the subpoenas—appealed, arguing that the FSIA barred the discovery request because it might reach assets that would be immune under the FSIA or located outside the United States.<sup>22</sup> In the Supreme Court, Argentina was joined in this argument by the United States, which participated as *amicus curiae*.<sup>23</sup>

Meanwhile, as it waged its fight over post-judgment asset discovery, NML opened a second front with an action to enforce its separate rights under the Equal Treatment Provision on bonds on

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18. *Id.* at 252–54.

19. *Id.* at 252–53.

20. *Id.* at 253.

21. *Discovery Case*, 134 S. Ct. at 2253.

22. See Corrected Brief of Defendant-Appellant at 23–39, *EM Ltd. v. Republic of Argentina*, 695 F.3d 201 (2d Cir. 2012) (No. 11-4065); Brief for Petitioner at 25–53, *Discovery Case*, 134 S. Ct. 2250 (No. 12-842), available at [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v3/12-842\\_pet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/12-842_pet.authcheckdam.pdf).

23. Brief for the United States as Amicus Curiae in Support of Petitioner at 11–33, *Discovery Case*, 134 S. Ct. 2250 (No. 12-842), available at [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v3/12-842\\_pet\\_amcu\\_usa.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/12-842_pet_amcu_usa.authcheckdam.pdf).

which judgment had not yet been entered. NML sought and obtained an injunction that specifically enforces that Provision by prohibiting Argentina from paying what is due on the Exchange Bonds unless it also pays what is due under the defaulted bonds.<sup>24</sup> The injunction thus gave Argentina a choice: pay what it owes under both the Exchange Bonds and the defaulted bonds, pay a portion of its obligations under both, or pay neither. The district court stayed the injunction pending completion of the appeal.

On appeal, Argentina again reached to the FSIA. Argentina argued that the injunction operated as an attachment of Argentina's immune property, or as an attachment of property outside the United States. Argentina reasoned that the injunction's goal was to get Argentina to pay its obligations, and therefore it was effectively a turnover order equivalent to an attachment.<sup>25</sup> The United States, as *amicus curiae*, also contended that the injunction "[c]ontravene[d] the [p]urpose and [s]tructure of the FSIA."<sup>26</sup> The Second Circuit rejected these arguments, concluding that the injunction "do[es] not operate as [an] attachment[] of foreign property prohibited by the FSIA."<sup>27</sup> An "attachment," by its plain terms, requires "a court's seizure and control over specific property," and the injunction involved no such seizure.<sup>28</sup> Moreover, the injunction did not grant the same relief as an attachment, because it simply provided Argentina with a choice as to how to dispose of its property; it did "not require Argentina to pay any bondholder any amount of money."<sup>29</sup> The court rejected Argentina's and the United States' attempts to impose an immunity-based limitation on the district court's authority to issue injunctions divorced from the FSIA's specific text, explaining that "the FSIA imposes no limits on the equitable powers of a district court that has

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24. *Equal Treatment Case I*, 699 F.3d at 254–56.

25. See Brief of Defendant-Appellant at 49–53, *Equal Treatment Case I*, 699 F.3d 246 (No. 12-105) ("The district court's expressed rationale for the Permanent Injunctions was precisely that they would force the Republic to turn over a material portion of its foreign currency reserves to satisfy plaintiffs' eventual judgments.").

26. See Brief for the United States of America as *Amicus Curiae* in Support of Reversal at 22–28, *Equal Treatment Case I*, 699 F.3d 246 (No. 12-105) ("In sum, parties cannot avoid the limitations deliberately imposed by Congress on judicial execution authority and expand the scope of remedies available to them in an action against a sovereign simply by refraining from asking the court to reduce their claims to judgment. There is no indication in the statutory text or history that Congress intended for litigants to be able to sidestep sections 1609-1611 by seeking an injunction that restrains the sovereign's use of immune assets until a judgment is satisfied, rather than an order of execution against those same assets.").

27. *Equal Treatment Case I*, 699 F.3d at 262.

28. *Id.*

29. *Id.* at 262–63.

obtained jurisdiction over a foreign sovereign.”<sup>30</sup>

The Second Circuit remanded for further clarification of the injunction’s payment formula and its effect on third parties involved in the payment of Argentina’s exchange bonds,<sup>31</sup> which the district court soon provided.<sup>32</sup> On its return trip to the Second Circuit, appealing the clarified injunction, Argentina repeated its already-rejected FSIA arguments.<sup>33</sup> The court of appeals again rebuffed Argentina’s immunity arguments, citing its prior opinion and noting that, should Argentina choose to pay on the defaulted bonds, “the injunctions allow Argentina to pay its [defaulted] debts with whatever resources it likes.”<sup>34</sup> The court affirmed the injunction in its entirety, but continued the stay until the Supreme Court decided whether to review the case. And indeed, after the Second Circuit denied Argentina’s petition for rehearing,<sup>35</sup> Argentina petitioned the Supreme Court for certiorari.<sup>36</sup> Argentina’s certiorari petition argued that the injunction “coerce[d] [it] into satisfying the debt with assets that the FSIA declares immune from enforcement of a money judgment,” by putting it to a “‘choice’ between satisfying a monetary obligation to [the plaintiffs] and defaulting on \$24 billion of exchange bond debt.”<sup>37</sup> Argentina obtained eight amicus briefs supporting its petition, including those from fellow sovereigns France, Mexico, and Brazil, as well as Nobel laureate Joseph Stiglitz.<sup>38</sup>

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30. *Id.* at 263.

31. *Id.* at 250–51, 265.

32. *NML Capital, Ltd. v. Republic of Argentina*, No. 08-cv-6978, 2012 WL 5895786 (S.D.N.Y. Nov. 21, 2012).

33. *See* Brief of Defendant-Appellant at 20–26, *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 240–41 (2d Cir. 2013) (No. 12-105), *available at* <http://www.shearman.com/~media/Files/Old-Site-Files/NMLCapitalvArgentina20121228BriefofArgentina.pdf>.

34. *NML Capital, Ltd. v. Republic of Argentina (Equal Treatment Case II)*, 727 F.3d 230, 240–41 (2d Cir. 2013).

35. *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105 (2d Cir. Nov. 19, 2013) (corrected order denying petition for rehearing), *available at* <http://www.shearman.com/~media/Files/Services/Argentine-Sovereign-Debt/2013/NML-1038.pdf>.

36. Petition for Writ of Certiorari, *Equal Treatment Case III*, 134 S. Ct. 2819 (No. 13-990), *available at* <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/03/2014-02-18-Argentina-Petition-for-Certiorari-Final-as-filed1.pdf>.

37. *Id.* at 22–30.

38. Brief of the Federative Republic of Brazil as Amicus Curiae in Support of Petitioner, *Equal Treatment Case III*, 134 S. Ct. 2819 (No. 13-990); Brief of Joseph Stiglitz as Amicus Curiae in Support of Petitioner, *Equal Treatment Case III*, 134

### III. THE DISCOVERY CASE DECISION

On June 16, 2014, the Supreme Court decided both cases. In the Discovery Case, the Court affirmed on the merits, explaining that the FSIA's text provides the complete set of immunities a foreign sovereign may invoke.<sup>39</sup> The FSIA was born of Congress's desire to undo the "bedlam" that had arisen from "the old executive-driven, factor-intensive, loosely common-law-based immunity regime."<sup>40</sup> Congress "replac[ed]" that uncertainty with a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state."<sup>41</sup> The "key word," the Court emphasized, "is *comprehensive*."<sup>42</sup> The Court noted that it had used that term repeatedly before "to describe the Act's sweep."<sup>43</sup> "Thus," the Court concluded, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall."<sup>44</sup>

Argentina's immunity defense had no moorings in the FSIA's text, and so it fell. The Court laid out both of the "immunity-conferring provision[s]" contained in the FSIA—one providing immunity from jurisdiction, and one providing immunity from attachment. As Argentina conceded, the Court explained, "[t]here is no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets."<sup>45</sup> Because "the Act says not a word on the subject" of such discovery limits, the Court

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S. Ct. 2819 (No. 13-990); Brief for the Republic of France as Amicus Curiae in Support of the Republic of Argentina's Petition for a Writ of Certiorari, *Equal Treatment Case III*, 134 S. Ct. 2819 (No. 13-990); Brief of the United Mexican States As Amicus Curiae in Support of Petitions for Writs of Certiorari, *Equal Treatment Case III*, 134 S. Ct. 2819 (No. 13-990). See also Brief of Amicus Curiae Caja de Valores, S.A. in Support of Petitioner, *Equal Treatment Case III*, 134 S. Ct. 2819 (No. 13-990); Brief of Amicus Curiae Euroclear Bank SA/NV in Support of Petitioner, *Equal Treatment Case III*, 134 S. Ct. 2819 (No. 13-990); Brief for Jubilee USA Network as Amici Curiae in Support of Petitioners, *Equal Treatment Case III*, 134 S. Ct. 2819 (No. 13-990); Brief of Amici Curiae in Support of the Petition for Writ of Certiorari, *Equal Treatment Case III*, 134 S. Ct. 2819 (No. 13-990). All are available at: <http://www.scotusblog.com/case-files/cases/republic-of-argentina-v-nml-capital-ltd>.

39. *Discovery Case*, 134 S. Ct. at 2255–56, 2258.

40. *Id.* at 2255.

41. *Id.* (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983)).

42. *Id.* (emphasis in original).

43. *Id.* at 2255–56 (quoting *Verlinden*, 461 U.S. at 493 and *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004)).

44. *Id.* at 2256.

45. *Id.*



declined to displace the normal “federal discovery rules” and take up Argentina’s suggestion that it craft an atextual immunity defense.<sup>46</sup>

The mere fact that NML’s discovery “request is bound to turn up information about property that Argentina regards as immune” was not a sufficient reason to reject it.<sup>47</sup> The Court noted that “the reason for these subpoenas is that NML does not yet know what property Argentina has and where it is, let alone whether it is executable under the relevant jurisdiction’s law,” and the whole point of “discovery in postjudgment execution proceedings” is to allow the plaintiff to obtain that information.<sup>48</sup> Since the FSIA challenge was the only argument Argentina properly raised, the Court affirmed the discovery order.<sup>49</sup>

#### IV. THE FSIA’S LIMITS AND CONTRACT ENFORCEMENT

On the same day, the Court denied Argentina’s certiorari petition in the Equal Treatment Case. As almost always occurs,<sup>50</sup> the Court did not explain its reasons for denying the petition.<sup>51</sup> Yet, the Discovery Case decided the same day provides a clue—and, at least, *an* explanatory rationale. The central federal issue on which Argentina sought certiorari was the same one the Court decided in the Discovery Case—whether FSIA conferred an immunity not explicitly provided in its text. In the Discovery Case, the immunity Argentina sought was from discovery in aid of attachment; in the Equal Treatment Case, the immunity was from an injunction that Argentina asserted had the same goal as attachment.

The Supreme Court rejected all such atextual immunities in the Discovery Case. The Court’s central holding was that “*any sort of immunity defense* made by a foreign sovereign in an American court must stand on the Act’s text. Or it must fall.”<sup>52</sup> And the FSIA’s text provides only “two kinds of immunity”: immunity from jurisdiction and immunity from attachment.<sup>53</sup> Just as “[t]here is no third provision” about discovery in aid of attachment, there is no third

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46. *Id.* at 2256–57.

47. *Id.* at 2258.

48. *Id.* at 2254, 2257–58.

49. *Id.* at 2255 & n.2, 2258.

50. STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 5.5, at 329 (10th ed. 2013).

51. *Equal Treatment Case III*, 134 S. Ct. at 2819.

52. *Discovery Case*, 134 S. Ct. at 2256 (emphasis added).

53. *Id.*

provision about injunctions.<sup>54</sup> Just as the FSIA says nothing to displace the normal “federal discovery rules,”<sup>55</sup> so too it says nothing to displace Federal Rule of Civil Procedure 65, governing injunctions. To the contrary, the FSIA provides that where the sovereign is not immune from jurisdiction, “the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances,” forbidding only punitive damages.<sup>56</sup>

The Court’s decision in the Discovery Case thus closed off any possibility for Argentina to prevail on its FSIA argument in the Equal Treatment Case. Even if the Equal Treatment Case had satisfied the Supreme Court’s typical criteria for the exercise of certiorari jurisdiction—the existence of a Circuit split, a conflict with a decision of the Supreme Court, or a federal question of exceptional importance<sup>57</sup>—granting review would have been pointless because the result was foreordained by the reasoning of the Discovery Case. Nor was a “grant, vacate, and remand” order—a common practice when a recent Supreme Court decision could change the outcome of a case on petition—appropriate, because after the Discovery Case there could be no “reasonable probability” of a different outcome.<sup>58</sup> Rather, the Discovery Case *confirmed* that the outcome in the Equal Treatment Case was correct.

Where neither of the two immunities found in the FSIA’s text applies, the normal rules of substantive contract law govern specific performance orders like the injunction NML obtained. Under these principles, parties will be held to their promises—and, indeed, ordered to fulfill those promises where certain conditions are met.<sup>59</sup> Specific performance serves important purposes. As law and economics scholars have long noted, “if contractual parties are on notice that valid promises will be specifically enforced, they will more efficiently exchange reciprocal promises at formation time.”<sup>60</sup> Further, a legal regime where promises are enforceable “promotes contract breach only if it is efficient.”<sup>61</sup> Moreover, in the event of a

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54. *Id.*

55. *Id.*

56. 28 U.S.C. § 1606 (2012).

57. *See* SUP. CT. R. 10 (enumerating and discussing the Supreme Court of the United States’ considerations governing review on certiorari).

58. SHAPIRO ET AL., *supra* note 50, § 5.12(b), at 350 (citation omitted).

59. *Equal Treatment Case I*, 699 F.3d at 261.

60. Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 365 (1984).

61. *Id.*

breach, an enforceable remedy allows for “voluntary negotiations” to secure an efficient settlement.<sup>62</sup>

The same reasons for enforcing contracts in the general case apply in the specific instance of sovereign debt as well. If countries know that investors will have *some* enforceable remedy in the event of default, they will be wary about defaulting, and will do so only if economic conditions truly require it. In the event of default, an enforceable remedy encourages sovereigns to settle rather than leaving themselves in a state of default until a new set of political leaders takes over. Most importantly, the knowledge that promises will be enforceable enables contract formation in the first place. If promises are not enforceable, and investors have nothing to rely on but a country’s political will to keep its word, investors will be rightly wary of spending their money on what may end up being a worthless piece of paper. Investors may demand higher interest rates, or may refuse to lend money at all.

This concern is particularly acute for countries with lengthy histories of default. If sovereigns that have defaulted repeatedly in the past had no way to protect investors against another default, those countries may not be able to find willing lenders, or may be able to find them only by offering expensive rates of interest. Sovereign bond contracts can provide such a means of ensuring investors—but only when they are enforceable. If there is at least one clause, and one jurisdiction that will enforce it, to effectively bind sovereigns, then sovereigns who wish to show that they are serious about respecting their promises can select that clause and that jurisdiction.<sup>63</sup> A specifically enforceable clause functions as Ulysses’ rope: just as Ulysses was able to tie himself to the mast of his ship to prevent himself from heeding the inevitable Sirens’ cry, so too sovereigns will be able to tie themselves to their promises and avoid the temptation of future default.<sup>64</sup> A jurisdiction that enforces certain

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62. *Id.* at 366.

63. This is a major benefit of the Second Circuit’s ruling in the Equal Treatment Case, as the court itself recognized. In discussing the public interests advanced by the injunction, the court explained that “our decision affirms a proposition essential to the integrity of the capital markets: borrowers and lenders may, under New York law, negotiate mutually agreeable terms for their transactions, but they will be held to those terms.” *Equal Treatment Case II*, 727 F.3d at 248. Thus, “the interest—one widely shared in the financial community—in maintaining New York’s status as one of the foremost commercial centers is advanced by requiring debtors, including foreign debtors, to pay their debts.” *Id.*

64. Other commentators have noted the connection between contract enforcement and the Ulysses myth. See, e.g., Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J. LEGAL STUD.

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promises will thus enable countries to get out from under their own torrid histories of default—a result not achievable if sovereign immunity barred such enforcement.

But judicially enforceable remedies are not for everyone. A sovereign, like any other contracting party, has myriad *options* as to what promises it wishes to make; the willingness of another side to do business will depend on the contract terms. Some countries find it unnecessary to bind themselves to especially protective terms. For example, Mexico recently issued debt without the same protections Argentina provided in the Fiscal Agency Agreement governing the defaulted bonds.<sup>65</sup> In addition to simply not providing the same Equal Treatment language Argentina included, countries can also include collective-action clauses that permit sovereigns to modify *any* terms of a contract with the agreement of a supermajority of bondholders, thus preventing holdout litigation so long as the sovereign offers a reasonable restructuring deal.<sup>66</sup>

## V. CONCLUSION

Because the FSIA does not limit the availability of injunctive relief, sovereigns can entice investors with promises that are enforceable through injunctions. Had Argentina been able to defeat the Equal Treatment injunction, its victory would have enabled it to avoid its obligations in the short term, but would have hampered the ability of countries in the same position to finance their operations in the future. Textually limited sovereign immunity provides predictability and options—virtues that benefit not only investors, but sovereigns as well.

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203, 210 (1997) (using Ulysses to illustrate that “opportunities for ex post profitable modification may reduce contractors’ ex ante welfare in settings in which one party has preferences that vary over the course of the contracting relationship.”).

65. See Landon Thomas, *Mexico’s Bold Move on Debt Restructuring Contracts*, N.Y. TIMES DEALBOOK (Nov. 12, 2014, 12:42 PM), <http://dealbook.nytimes.com/2014/11/12/mexicos-bold-move-on-debt-restructuring-contracts> (discussing bonds recently issued by Mexico that have new collective-action clauses “specifically written to keep holdout investors . . . at bay”).

66. See, e.g., *Equal Treatment Case I*, 699 F.3d at 264; *Equal Treatment Case II*, 727 F.3d at 247–48.